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No. 85-5-86

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD CAYLOR,

Petitioner,

v.

THE CITY OF RED BLUFF, *et al.*,

Respondents.

On Petition for Certiorari to the California Court of Appeal, Third Appellate District

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent City of Red Bluff concurs in general with Petitioner's statement of the case on file herein. Petition for Writ of Certiorari, pp. 3-13. However, certain procedural points are significant to this petition and should be reemphasized here.

It is important to note that this matter arose initially as an employment discrimination charge before the California Fair Employment Practices Commission (FEPC). Petitioner, challenging his nonselection for the position of firefighter with the City of Red Bluff, elected to pursue his administrative remedy before the FEPC, and filed a

complaint with that agency on December 8, 1978. Slightly over three months later Petitioner withdrew his charge, choosing to pursue judicial proceedings in *state* court. It was in response to Petitioner's abrupt termination of the administrative process that the FEPC prematurely stopped its investigation without any definitive conclusion. Petition for Writ of Certiorari ("Petition"), p. 7.

Respondents first raised the exhaustion issue in their demurrer to Petitioner's complaint, asserting that Petitioner's election to initiate administrative proceedings before the FEPC required that those proceedings be completed before state court jurisdiction could be invoked. Petition, p. 8. However, because the employment discrimination claim had been withdrawn by Petitioner and subsequently dropped by the FEPC, the superior court deemed it unnecessary to reach the exhaustion issue and entered judgment for Respondents on the merits. Petition, p. 9. The Court of Appeal, however, found that the exhaustion question was jurisdictional and, in denying Petitioner's appeal, ruled that Petitioner had failed to exhaust administrative remedies. Petition, p. 11.

The Court of Appeal's decision turns on the fact that Petitioner abruptly and without apparent justification aborted the administrative proceeding before the FEPC. The Court of Appeal held that Petitioner's election to avoid the administrative process, once having initiated it, could not be deemed as compliance with the requirement of exhaustion. The Court of Appeal granted rehearing on this issue and ultimately reaffirmed its conclusion that Petitioner had failed to exhaust administrative remedies. Petitioner's request for review before the California Supreme Court was subsequently denied. Petition, p. 13.

I. INTRODUCTION

Petitioner seeks this Court's review of a California Court of Appeal's determination that exhaustion of administrative remedies is necessary to maintain a cause of

action under 42 U.S.C. Section 1983 in *state* court. Petitioner contends that review is appropriate because the decision below conflicts with applicable decisions of this Court, with the congressional intent behind Section 1983, and with rulings in state courts as to whether exhaustion is required to maintain a Section 1983 action in a state tribunal. Petitioner further contends that review is necessary to assure uniformity in the application of Section 1983. Petitioner's contentions do not satisfy the requirements of Rule 17 of this Court, and this petition for writ of certiorari should therefore be denied.

Detailed rebuttals to each of Petitioner's contentions are contained in the succeeding sections of this brief. In summary, they focus on the following:

1. The decision below has very limited application and virtually no precedential effect in view of its status as an unreported decision. Thus, the decision below does not present an important question which should be settled by this Court.

2. There is no conflict between the decision below and other decisions of this Court, including *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Indeed, the decision below clearly articulates the differences between immediate access to federal courts and reasonable state regulation of access to state courts.

3. There is no indication in the legislative history of 42 U.S.C. 1983 that suggests Congress intended to prohibit states from controlling their own judicial systems. Indeed, Congress accepted the fact that such state controls could and would occur, and for that reason Congress enacted 42 U.S.C. 1983 to assure immediate access to federal courts without affecting access to state courts.

4. The decision below presents no threat to the uniform application of Section 1983. A Section 1983 claimant may

elect to avoid administrative processes altogether by proceeding directly to federal court. Nothing in the decision below affects such immediate access. If, however, a claimant elects to invoke the administrative process, and, before completing it, further elects to proceed in state court as appellant did below, that claimant has voluntarily submitted to processes which he/she cannot later insist be eliminated. Indeed, to permit the claimant a choice of forums to remedy alleged discrimination actually furthers one of the purposes of Section 1983 in eliminating discrimination.

For the reasons summarized above and discussed more fully below, Petitioner has not satisfied the requirements of Rule 17, nor has he established a need for this Court to intervene in a state's regulation of its own judicial system.

II. THE CALIFORNIA APPELLATE COURT'S DECISION IS NOT PRECEDENTAL, AND THEREFORE IS INAPPROPRIATE FOR THIS COURT'S REVIEW

As noted in the Petition for Writ of Certiorari, the opinion of the California Court of Appeal herein was unreported and unpublished. Petition, p. 1. As discussed below, this decision's status as an unreported opinion limits dramatically its effect and thus its appropriateness for this Court's review.

In California, appellate courts may decide to publish or not publish their decisions based on specific criteria. California Rules of Court, Rule 976(b). The significance of a decision not to publish is that the opinion may not be "cited or relied on by a court or party in any other action or procedure." California Rules of Court, Rule 977. The opinion resolves only the dispute between the immediate parties. It does not stand as a precedential interpretation of the law and should not be construed as creating an impact of the magnitude appropriate for this Court's review under Rule 17 of the Rules of the Supreme Court of the United States.

The criteria relied on by the court below in reaching the decision not to publish reinforce the conclusion that the decision does not have the significance necessary for a grant of certiorari. California appellate courts publish their opinions only if the opinion:

> "(1) establishes a new rule of law . . . .
>
> (2) resolves or creates an apparent conflict in the law;
>
> (3) invokes a legal issue of continuing public interest; or
>
> (4) makes a significant contribution to legal literature. . . ."
>
> California Rules of Court, Rule 976(b).

Thus, the California Court of Appeal, in deciding not to publish its opinion herein, determined that its decision established no new rule of law, neither resolved nor created a conflict in the law, invoked no legal issue of public importance, and made no significant contribution to legal literature. The California Supreme Court, which denied a hearing and did not order publication, implicitly agreed that none of the above criteria had been met.

Since the non-publication of the lower court decision signals a very limited application, the standards of Rule 17 for a grant of certiorari have not been met and this Court need not decide the issues presented.

III. THE DECISION BELOW IS IN HARMONY WITH DECISIONS OF THIS COURT AND THE CONGRESSIONAL INTENT BEHIND SECTION 1983

A. The Decision Of The California Court of Appeal Is In Harmony With *Patsy* v. *Florida Board of Regents*

Petitioner contends that the decision below conflicts with *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). A brief review

of *Patsy* discloses that it differs fundamentally from the present case, and a detailed review suggests that the rationale of *Patsy* actually supports the decision below.

The holding in *Patsy* clearly established that a plaintiff in a Section 1983 action need not exhaust a *state* administrative remedy before proceeding in *federal* court. The present matter arose in *state* court, not federal court. Nothing in the decision below alters the holding in *Patsy*, nor could it do so. The two decisions deal with completely different situations. *Patsy* was a federal decision clarifying access to federal courts. The decision below is a state court decision determining access to that state's courts.

For the foregoing reasons, it is clear that the decision in *Patsy* does not conflict with the decision below. In fact, the two decisions are actually consistent in several respects. The initial basis for this Court's holding in *Patsy* focuses on the legislative history of 42 U.S.C. Section 1983, and throughout that analysis, this Court refers only to the immediate access to *federal* courts. For instance, the Court notes the legislative intent in assigning federal courts a paramount role in protecting constitutional rights to "throw open the doors of the *United States Courts*," to further the purposes of "interposing the *federal* courts between the states and the people," and to expand federal court jurisdiction due to the belief that state authorities had been unable or unwilling to protect constitutional rights of individuals. *Patsy* v. *Board of Regents*, *supra*, 457 U.S. at 504-505. [Emphasis added.] It is clear from the above that this Court concluded in *Patsy* that Congress had acknowledged the restrictions imposed by states and, without altering those restrictions, assured claimants unrestricted access to federal courts.

It is also clear from this Court's analysis in *Patsy* that the concept of exhausting administrative remedies as a

prerequisite to judicial relief was not, on its face, offensive. In fact, this Court states that the policy considerations of whether or not to require exhaustion do not "point in one direction," and notes that Congress under 42 U.S.C. Section 1997(e) specifically requires exhaustion of administrative remedies for Section 1983 claims of adult convicted prisoners. *Patsy* v. *Board of Regents*, *supra*, 457 U.S. at 512.

Instead of criticizing the theory of an exhaustion requirement, this Court looked to a legislative history that accepted state regulation and, in turn, assured immediate access to federal court for Section 1983 claims. Even though 42 U.S.C. Section 1983 provides concurrent federal and state jurisdiction, nothing in *Patsy* or the legislative history of Section 1983 suggests that access need be immediate to more than one judicial system. Indeed, there is no reason or logic to requiring such redundancy.

B. The Decision Below Is Not In Conflict With The Congressional Intent Behind Section 1983

Section 1983 is silent as to whether or not a state can require exhaustion of state administrative remedies prior to bringing a Section 1983 claim in a state court. The court may defer the exercise of jurisdiction under a federal statute when it is consistent with congressional intent. *Patsy* v. *Board of Regents*, *supra*, 457 U.S. at 502. Any analysis of the purposes and scope of Section 1983 must take cognizance of the events at the time of its enactment. *District of Columbia* v. *Carter*, 409 U.S. 418, 425, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973).

Prior to passage of Section 1983, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. *See*, *District of Columbia* v. *Carter*, *supra*, 409 U.S. at 428. Since the states were faltering in this area, Congress intended that Section 1983 "throw open the doors of the United States

Courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42nd Congress, 1st Session, 376 (1871) remarks of Congressman Lowe. Another Congressman stated a similar concern:

> "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; . . . they will be able to rise above prejudices or bad passions or terror more easily . . . we believe we can trust our United States Courts. . . ." Cong. Globe 460 (remarks of Congressman Coburn).

In addition, this Court has interpreted Section 1983 as altering the balance of judicial power by adding access to the federal courts. *Allen* v. *McCurry*, 449 U.S. 90, 99, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

Congress makes no reference to opening up *state* courts for immediate access. In fact, Congress had accepted the fact that access to state courts was either hindered or foreclosed, and, without attempting to modify state court access, specifically provided for immediate access to federal courts. Indeed, the very fact of limitations on state access was the overriding reason for assuring immediate access to federal courts. Numerous references to these conditions are found throughout the congressional debate. According to Congressman Lansing: ". . . there is a condition of practical and positive insurrection. The courts are closed; juries intimidated or in complicity with the enemies of the government. . . ." Cong. Globe 487. Another described the situation as follows: "Can an American Citizen live in that community where the courts are set at naught; where the laws are scoffed at and blown like chaff before the wind . . . ?" Cong. Globe 477. This court itself has recognized that Congress intended Section 1983 to provide access to federal courts since the Fourteenth Amendment rights of individuals might be denied by state agencies due to "prejudice, passion, ne-

glect, intolerance, or otherwise." *District of Columbia* v. *Carter*, *supra*, 409 U.S. at 428; *Monroe* v. *Pape*, 365 U.S. 167, 180, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Thus, the above cases and the congressional debate acknowledge that states could limit access to their courts, thereby creating the need for immediate access to federal courts. The decision below is not in conflict with this intent because it did not affect access to federal court.

1. *Congress Anticipated Appropriate State Agency Actions*

A common theme in the legislative debate discussed above was a distrust for some state agencies. Such a distrust does not necessarily lead to Petitioner's conclusion that Congress intended to eliminate all state administrative procedures permanently. As this Court noted, Congress anticipated that the states would eventually act responsibly and would recognize and protect the civil rights of the individual. Upon review of the numerous references to the concurrent jurisdiction of state courts to hear Section 1983 actions, this Court concluded that Congress intended for state courts to retain their established jurisdiction so that "when the political passion abated, the states could demonstrate a new sensitivity to federal rights." *Allen* v. *McCurry*, *supra*, 449 U.S. at 99-100. Clearly, that time has now come.

The atmosphere has changed since the post-Civil War period when Section 1983 was enacted. This Court and Congress have recognized that change and have recently relied on the states' abilities to effectively administer and protect civil rights. In *Allen* v. *McCurry*, *supra*, this Court was willing to give collateral estoppel effect to a state court's decision in a Section 1983 action, since the state had recognized the constitutional claim asserted and had provided fair procedures in determining the claim. *Allen* v. *McCurry*, *supra*, 449 U.S. at 105. Congress, in

the Civil Rights of Institutionalized Persons Act, 42 U.S.C. Section 1997(e), provided for deferral of the exercise of federal jurisdiction over Section 1983 claims of adult prisoners until after the exhaustion of adequate state grievance procedures. In addition, this Court in *Smith* v. *Robinson*, —— U.S. ——, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), deferred to state administrative procedures established pursuant to the Education of the Handicapped Act, in lieu of allowing a handicapped student to bring a Section 1983 action in federal court.

Therefore, it is clear that the courts and Congress are now willing to entrust Section 1983 claims to state administrative agencies that provide fair and adequate procedures. Here, the California Legislature, by providing a thorough procedure for handling Petitioner's claim based on Section 1983, has demonstrated a sensitivity to federal rights. An exhaustion requirement is consistent with the trust of Congress and this Court in the adequacy of state administrative procedures.

2. *The Decision Below Is Not In Conflict With The Intent Of Providing Compensation To Persons Whose Civil Rights Have Been Violated*

The overriding purpose of Section 1983 is the compensation of persons whose civil rights have been violated and the prevention of the abuse of state power. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). In the case at hand, the California Department of Fair Employment and Housing (DFEH) can grant full relief, including damages, reinstatement, injunctions, and declaratory relief (Ct. App. Opinion, p. 5, n.1). The purpose of DFEH is to remedy violations of the very rights that Section 1983 is designed to protect. (A more detailed discussion of DFEH appears in Section V of this brief.) Requiring that a plaintiff seek an investigation by such an administrative agency does not violate the purpose of Section 1983. It furthers that purpose.

C. The Decision Below Is Not In Conflict With *Martinez* v. *California*

Petitioner contends that the decision below violates the rule established in *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). On the contrary, the decision below in no way conflicts with *Martinez*.

At issue in *Martinez* was whether or not a California statute, which provides public entities and public employees with immunity from liability for injury resulting from parole decisions, applied to a Section 1983 claim brought in state court. This Court found that such an immunity from liability under Section 1983 conflicted with the substantive purpose of Section 1983, namely, providing a remedy for violations of federal civil rights. *Martinez* v. *California*, *supra*, 444 U.S. at 284, n.8.

The decision below does *not* conflict with the underlying purpose of Section 1983. The decision below actually furthers that purpose by providing an administrative remedy for violations of civil rights, in addition to the judicial remedy. It limits neither the liability nor the remedies for violations of Section 1983; if anything, it expands them. Requiring that the administrative remedy be pursued before a state court hears the matter assures an integrity and a logic to the sequence of adjudications. There is no conflict with the purposes of Section 1983 and thus *Martinez* is inapplicable to the present dispute.

IV. STATE COURTS MAY PROPERLY REQUIRE PLAINTIFFS TO EXHAUST ADMINISTRATIVE REMEDIES

This Court has held that the legislative history of Section 1983 specifically shows congressional intent to allow concurrent state and federal jurisdiction over Section 1983 claims. *Patsy* v. *Florida Board of Regents*, *supra*, 457 U.S. at 506-507; *Maine* v. *Thiboutot*, 448 U.S. 1, 3, n.1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). Although

this Court has never decided whether a state court must accept jurisdiction of Section 1983 claims (*Martinez* v. *State of California, supra*, 444 U.S. 277, 283, n.7), the courts of California have accepted jurisdiction of such cases. *Williams* v. *Horvath*, 16 Cal.3d 834, 837, 129 Cal. Rptr. 453 (1976); *Brown* v. *Pitchess*, 13 Cal.3d 518, 520-523, 119 Cal.Rptr. 204 (1975).[1]

However, merely accepting concurrent jurisdiction of federal claims does not require a state court to become a federal court. *Minneapolis & St. Louis Railroad Co.* v. *Bombolis*, 241 U.S. 211, 222, 36 S.Ct. 595, 60 L.Ed. 961 (1915). Rather, the state court may apply its own "rules, principles and precedents" in hearing a federal claim. *King* v. *Schumacher*, 32 Cal. App. 2d 172, 182, 89 P.2d 466 (1939) (California court applying state standard of review in Federal Employers' Liability Act case). This is true as long as the local practice does not defeat the essence of the federal right asserted. *Davis* v. *Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923).

This idea is basic to the federal system and to "the belief that the National Government will fare best if the States and their Institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (federal court should not issue injunction against pending state court proceedings).

Under statutes other than Section 1983 where state and federal courts have concurrent jurisdiction, the states have been allowed to apply their own practices and procedures. In Federal Employers' Liability Act (FELA) cases, state courts have been allowed to apply their own law with respect to non-unanimous jury verdicts (*Minneapolis & St. Louis Railroad Co.* v. *Bombolis, supra*, 241 U.S. 211); submission of a cause on special verdict (*Kansas City*

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[1] See Petitioner's Appendix, pp. 106a-111a for a complete list of all states which have accepted jurisdiction of Section 1983 claims.

So. Ry. Co. v. *Leslie*, 238 U.S. 599, 35 S.Ct. 844, 59 L.Ed. 1478 (1914)); directed verdicts (*Brenzier* v. *Nashville, C. & St. L. Ry.*, 3 S.W.2d 1053, 156 Tenn. 479 (1928)); and judgment n.o.v. (*Robertson* v. *Chicago R. I. & P. Ry. Co.*, 230 N.W. 585, 180 Minn. 578 (1930)). Although a dispute over the amount of the service fee in agency shop cases clearly presents federal constitutional issues (*Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)), there are requirements for exhaustion of administrative remedies before access to court. *San Jose Teachers Association* v. *Superior Court*, 38 Cal.3d 839, 215 Cal.Rptr. 250 (1985). California courts have held that the federal constitutional issues are preserved for trial after the administrative proceedings. *Leek* v. *Washington Unified School District*, 124 Cal. App. 3d 43, 52, 177 Cal.Rptr. 196 (1981).

California also permits access to court after DFEH proceedings on discrimination claims. DFEH has the power to seek settlement through conciliation (Calf. Govt. Code § 12963.7) and to issue cease and desist orders if discrimination is found. California Government Code Section 12970. However, the claimant may still raise constitutional claims of discrimination in state court whether or not DFEH acts. California Government Code Sections 12965(b), 12970(e).

> "[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as that permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence." *Garcia* v. *San Antonio Metro. Transit Authority*, —— U.S. ——,

105 S.Ct. 1005, 1017, 83 L.Ed.2d 1016 (1985) quoting *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 37 L.Ed. 772 (1893) (Field, J. dissenting).

Requiring plaintiffs to exhaust an administrative remedy similar to California's before bringing a Section 1983 case in state court is a legitimate exercise of a state's sovereign power. The California Legislature created the DFEH administrative process "to provide effective remedies which will eliminate such discriminatory practices [in employment and housing]." California Government Code Section 12920. California courts have endorsed the efficiency of this administrative process by consistently requiring plaintiffs to utilize the remedy when discrimination is alleged, even where a Section 1983 claim is not involved. *Snipes* v. *City of Bakersfield*, 145 Cal. App. 3d 861, 866, 193 Cal.Rptr. 760 (1983) (state cause of action for racial discrimination); *Bennett* v. *Borden, Inc.*, 56 Cal. App. 3d 706, 128 Cal.Rptr. 627 (1976) (state cause of action for age discrimination); *Hollon* v. *Pierce*, 257 Cal. App. 2d 468, 475, 64 Cal.Rptr. 808 (1967) (state cause of action for religious discrimination).

Any plaintiff who alleges a violation of Section 1983 can proceed immediately to federal court. *Patsy* v. *Florida Board of Regents*, *supra*, 457 U.S. 496. Nothing in the decision below affects such access to federal courts. If a plaintiff elects to pursue a Section 1983 claim in state court, that choice will subject the plaintiff to the rules, policies and practices that the state applies to litigants in that system. A requirement that a plaintiff in a state court proceed first to the administrative agency created to address his/her claims is reasonable on its face. In California, a plaintiff may proceed in state court after the expiration of 150 days from the filing of a complaint with the administrative agency. California Government Code Section 12965. This relatively short waiting period does not "defeat" a federal claim, especially given the

efficiency of the doctrine of exhaustion of administrative remedies.

> "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise and to correct its own errors so as to moot judicial controversies. [Citations omitted.]" *Parisi* v. *Davidson*, 405 U.S. 34, 37-38, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972).

It is certainly not unreasonable or inappropriate for a state court to adopt the reasoning of the foregoing Supreme Court analysis in an effort to lighten the load in its courts. *See*, *Morton* v. *Superior Court of Fresno County*, 9 Cal. App. 3d 977, 982, 88 Cal.Rptr. 533 (1970).

State courts' requirements of exhaustion are not a limit on a plaintiff's rights under Section 1983, but are a legitimate exercise of the states' independent legislative and judicial power. This case does not present an issue which must be decided by this Court.

V. CONCERNS ABOUT NATIONAL UNIFORMITY DO NOT REQUIRE INTERVENTION BY THIS COURT

Petitioner's contention that certiorari should be granted to ensure national uniformity is premised on an apparent fear that state exhaustion requirements, where they exist, somehow frustrate the purpose of Section 1983. Petitioner's national uniformity argument also presumes that, because state courts differ as to their exhaustion requirements, they necessarily conflict. To the contrary, existing state court exhaustion requirements, like those found in California, actually promote the purposes of Section 1983. Furthermore, the fact that some states require exhaustion while others do not, is not evidence of a lack of uniformity. There is uniformity in allowing each Section 1983 claimant immediate access to federal court. There is uniformity in a federal system that permits each state

to administer its own independent judicial system. There is also uniformity in the current state of the law that permits states to establish administrative agencies that can effectively resolve discrimination. A consistently uniform policy should allow those states to require resort to such agencies prior to proceeding in state court.

Because an exhaustion requirement does not interfere with the substantive rights provided by Section 1983, there is no need for uniformity among the states as to whether exhaustion is required. Thus, the fact that some states require exhaustion [2] while others do not [3] does not present a question which must be resolved by this Court.

A. Independent State Regulation Is Not Inconsistent With National Uniformity

In *Wilson* v. *Garcia*, —— U.S. ——, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), this Court analyzed state court processing of Section 1983 claims in a situation very similar to the instant case. In *Wilson*, this Court declared that Section 1983 claims are properly characterized as personal injury actions, and then deferred to the individual states' statutes of limitations:

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[2] *State ex rel. Basham* v. *Med. Licensing Board*, 451 N.E.2d 691 (Ind.App. 1983); *Snuggs* v. *Stanley County Department of Public Health*, 314 S.E.2d 528, 310 N.C. 739 (1984); *Bartschi* v. *Chico Community Memorial Hospital*, 137 Cal. App. 3d 502, 187 Cal.Rptr. 61 (1982); *Castelaz* v. *City of Milwaukee*, 289 N.W.2d 259, 94 Wisc.2d 513 (1980).

[3] *O'Connors* v. *Helfgott*, 481 A.2d 388 (R.I., 1984); *Laurel Park, Inc.* v. *Pac*, 485 A.2d 1272, 194 Conn. 677 (1984); *Maryland National Capital Park and Planning Commission* v. *Crawford*, 475 A.2d 494, 59 Md.App. 276 (1984); *Jackson* v. *Inhabitants of Town of Searsport*, 456 A.2d 852 (Maine, 1983); *Montalvo* v. *Consolidated Edison Co.*, 460 N.Y.S.2d 784 (1983); *Logan* v. *Southern California Rapid Transit District*, 136 Cal. App. 3d 116, 185 Cal.Rptr. 878 (1982); *Stratos* v. *Department of Public Welfare*, 439 N.E.2d 778, 387 Mass. 312 (1982).

> "[T]he need for national uniformity has not been held to warrant the displacement of state statutes of limitations for civil rights actions. [Citations deleted.]" *Wilson* v. *Garcia, supra,* —— U.S. ——, 105 S.Ct. at p. 1947.

Obviously, the result of that decision is to permit states to impose statutes of limitations of varying lengths in Section 1983 actions. Some states may require that personal injury actions be brought within one year (California Code of Civil Procedure Section 340) and others may impose much longer periods. *Smith* v. *City of Pittsburg,* 764 F.2d 188, 194 (3rd Cir. 1985) (applying Pennsylvania's two-year limit); *Jones* v. *Preuit & Mauldin,* 763 F.2d 1250, 1256 (11th Cir. 1985) (applying Alabama's six-year limit). Such variations apply to *all* Section 1983 actions whether brought in state or federal courts, and yet this Court found no danger to national uniformity.

The requirement for exhaustion of administrative remedies in state courts only, as presented by the instant case, presents *less* of a threat to national uniformity than did the prospect of widely differing statutes of limitations in *Wilson.* If this petition for certiorari is denied, every Section 1983 claimant will continue to have uniform and immediate access to federal court. This access does not depend on the state in which the action is brought, as it does in *Wilson.* The only variation will occur if the claimant elects to proceed in state court. As discussed, the variation between the state and federal courts does not pose any threat to the uniform application of Section 1983.

B. State Administrative Remedies Provide Swift And Effective Forums For Resolving Discrimination Claims

As discussed above, a central concern of Congress in enacting Section 1983 was to ensure that there was an unimpeded forum available to those complaining of civil

rights violations, particularly discrimination. That forum is federal court. Today that forum has been augmented by state agencies specifically established to handle discrimination claims. California's administrative agency, the Department of Fair Employment and Housing (DFEH) provides an additional, immediately available, effective forum for the adjudication of discrimination claims.

The California Fair Employment and Housing Act [4] establishes that freedom from employment discrimination based on race is a civil right. (*See*, Calif. Govt. Code § 12921.) A primary purpose of the Act is to ". . . provide effective remedies which will eliminate such discriminatory practices." Government Code Section 12920. Under the Act, the FEPC has "broad statutory authority to fashion remedies which are consistent with the purposes of the Act. . . ." California Administrative Code, Title 2, § 7286.9. Retroactive and prospective remedies, including back pay, injunctive and other equitable relief, seniority and reinstatement, are available to "make whole" a victim of discrimination. California Administrative Code, Title 2, § 7289.9, California Government Code Section 12970.[5]

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[4] In 1980, the Legislature enacted the California Fair Employment and Housing Act (FEHA or Act) (Gov. Code § 12900 et seq.) which recodified what had formerly been the California Fair Employment and Practices Act (FEPA) (former Labor Code § 1410 et seq.; see Stats. 1959, ch. 121 § 1, p. 2000 et seq.). Under the Act, the Legislature established the Department of Fair Employment and Housing (DFEH or Department) and the Fair Employment and Housing Commission. Today, the Department is charged with the duties formerly handled by the FEPC. Petitioner's claim would properly be subject to the authority of the Department and the same procedures (see n.7, *infra*) would be applied under both the old and the new laws. Thus, where DFEH is referred to, its predecessor, the FEPC, is also meant to be included.

[5] Given the DFEH's ability and authority to fully resolve employment discrimination claims, it is probable that Petitioner's complaint would have been fully resolved had he not aborted the DFEH proceedings by filing his superior court action. The advantages of

California's DFEH offices are located in eleven cities throughout the state[6] and provide an open forum in which persons feeling they have been discriminated against can seek relief. Under California law the DFEH must take action within 150 days or grant the complaining party a right-to-sue letter which then allows the filing of a claim in superior court.[7] This process assures that claims are processed in a timely fashion.

The DFEH has also proven itself to be amazingly effective at processing large numbers of claims.[8] The exper-

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pursuing a state DFEH remedy were clearly articulated by Justice O'Connor (J. Rehnquist joining) in her concurring opinion in *Patsy*:

> "At the very least, prior state administrative proceedings would resolve many claims, thereby decreasing the number of § 1983 actions filed in federal courts which are now straining under excessive case loads." (J. O'Connor concurring, joined by J. Rehnquist), *Patsy* v. *Board of Regents*, *supra*, 457 U.S. at 516-517. *See also*, Powell, J. dissenting and joined in part by Burger, C.J., in *Patsy* v. *Board of Regents*, *Id.* at pp. 532-534.

[6] The DFEH maintains offices with regular business hours and full staffs in San Francisco, Los Angeles, Fresno, San Diego, Sacramento, San Jose, Bakersfield, San Bernardino, Santa Ana, Ventura and Oakland.

[7] Complaining parties file complaints with the Department, which is required to investigate promptly. Government Code Section 12963. If the Department determines the claim to be valid, it must attempt to resolve the matter, confidentially, by conference, conciliation, and persuasion. Government Code Section 12963.7. If that process fails to resolve the dispute, the Department may then issue an accusation to be heard by the Fair Employment and Housing Commission. If no accusation is filed within 150 days or the dispute has not otherwise been resolved, complainants are given a right-to-sue letter and may then file suit in superior court. Government Code Section 12965.

[8] In fiscal year (July 1 to June 30) 1982-83, the Department received over 14,500 allegations of discrimination. Of these, 7,452 were deemed serious enough to warrant the filing of an official

tise and efficiency provided by the Department in resolving these discrimination claims remains unchallenged. The overriding purpose of Section 1983 to provide an effective forum is fully accommodated by the California judiciary's reliance on this administrative remedy.

Clearly, then, California's exhaustion requirement is not only authorized by Section 1983, but the administrative remedy it relies upon furthers the congressional intent behind the enactment of Section 1983.

CONCLUSION

For the reasons discussed herein, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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complaint. The Department investigated and closed 7,054 cases that year.

In fiscal year 1983-84, the Department received over 15,000 allegations of discrimination. Of these, 7,979 were deemed serious enough to warrant the filing of an official complaint. The Department investigated and closed 8,173 cases that year.

In fiscal year 1984-85, the Department received over 14,400 allegations of discrimination. Of these, 8,178 were deemed serious enough to warrant the filing of an official complaint. The Department investigated and closed 7,950 cases that year.